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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1064~~ 170

DON D. ROBEY, *Petitioner*,

v.

SUN RECORD COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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June 4, 1957

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SUN RECORD COMPANY, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Don D. Robey prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on March 21, 1957, in a cause Numbered 16,197, styled Don D. Robey, Appellant, v. Sun Record Company, Inc., Appellee.

Citation to Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals, printed in the appendix hereto, infra, p. 15, is reported in 242 F. 2d 684.

Jurisdiction

(i) The judgment of the Court of Appeals was entered on March 21, 1957, R. 631.

(ii) Rehearing was denied on April 25, 1957, R. 652.

(iii) The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

First: In this case jurisdiction of the Federal Court is based on a diversity of citizenship, and the Defendant is entitled to have any damages assessed against him limited to those allowable under State law; the trial court, sitting in this case without a jury, to sustain an award of $17,500.00 damages, did not define the specific pecuniary losses justifying such amount, but confined its finding of injury to the generality that such damage had been suffered by Plaintiff "by reason of its inability further to make" Parker records, and a "curtailment of sales" of two records previously released; the question is: Does this general finding, impossible of analysis for legal propriety under State law, satisfy for this case the requirement of Rule 52(a) that "the court shall find the facts specially"?

Second: Whether the Court of Appeals, in overruling Petitioner's contention that as a matter of law the evidence did not sustain the trial court's award of $17,500.00 damages, for loss of possible sales of phonograph records never offered for sale, and in part never recorded, has decided an important state question in conflict with applicable Texas law.

Rule Involved

The first question involved the construction of the familiar first requirement of Rule 52(a) of the *Rules of Civil Procedure*:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially * * *."

Statement of the Case

Jurisdiction vested in the District Court for the Southern District of Texas by reason of diversity of citizenship between Plaintiff, Sun Record Company, Inc., and the Defendants. The suit was instituted on March 24, 1954, by Sun, a corporation domiciled in Tennessee, against Robey and another, residents of Texas, seeking injunctions and actual and punitive damages of $100,000.00. Injunctive relief was denied because of the absence from the suit of the obligors on the contract claimed to support the action, but on a trial to the court, sitting without a jury, the trial judge, on December 20, 1955, rendered judgment in favor of Sun against Robey in the amount of $17,500.00 as the amount Plaintiff had "been damaged in its business through the tortious acts of the said Defendant, Don D. Robey" (R. 584). In findings of fact filed December 5, 1955, the trial judge determined that by contracting with one Parker, and selling records of his vocalizations, Robey had tortiously interfered with Sun's exclusive contract with Parker (R. 141-145).

The only finding by the trial judge related to any pecuniary loss by plaintiff was:

> "By reason of its inability further to make the number of records with Parker, as permitted under

its contract with him, and the curtailment of sales of those previously released, Plaintiff has suffered actual damage in the amount of $17,500." (R. 146)

Plaintiff's pleadings made no effort to define its damages in nature or extent, except to state that for actual and punitive damages it should recover $100,000 (R. 108).

Plaintiff's only witnesses were its President Samuel Phillips, its office manager, Marian Keisker, and its attorney, Grover McCormick (R. 151, 345, 399). No evidence on the matter of profits or losses was offered by Plaintiff, except for the testimony of Phillips and Miss Keisker.

The evidence relied on by Sun to show lost profits were sales[1] of 74,153 copies of the first Parker recording and of 27,433 copies of the second and last (R. 200, 203), and an "estimate" by Phillips that Sun had made a profit of 15¢ per record on the first (R. 254).

The following facts, contended by Robey to defeat Sun's claim of substantial damages, were proved by Sun's evidence:

(a) The first publication of Robey's claimed tortious interference was on December 19, 1953 (R. 219) and that the impact of this on his sales was not felt for a "few weeks" after that date (R. 320).

(b) Sales of the first record, No. 187, "began to recede" before November 1, 1953, when the second and final record, No. 192, was released (R. 307).

(c) That in November, 1953, sales of No. 192, the second record, dropped from a high of 6752 copies in

[1] Phillips "thought" these figures included substantial numbers of records given away in promotional efforts (R. 305).

one week to 1361 copies the next, and continued to slump lower through December, 1953, prior to the "impact" of the news of Robey's acquisition of Parker on the records trade (R. 308).

(d) Sun made more money in 1954 than it did in 1953 (R. 333).

(e) The business of selling records is "a highly speculative type of business"; Sun had had one record more successful than the first Parker record, and the artists who made it did not maintain popularity; "they didn't do anything after that one (R. 338); he is what is known in the trade as a one-shot artist or a one-record artist, strictly speaking" (R. 378).

(f) Parker's records were his own compositions (R. 299, 300), and "it's not a bit unusual" for a novelty feature "to go over big", and the same artist "not go over on other records" (R. 378).

(g) Plaintiff's estimate of costs on which it based its claim of net profit of 33-1/3% (15¢ per record) on records sold included no cost of overhead or the cost of the services of Mr. Phillips and Miss Keisker (R. 252); further the 15¢ figure was based on an estimate of a cost of $3000.00 for promotion, and this figure of costs "is conservative, that we spent that much and more than that much, at least that much" (R. 287).

(h) Phillips, Sun's expert on sales, could not estimate possible future sales of records (R. 319).

In the Court of Appeals, Robey contended (a) that the proof of sales of the first two Parker records, in view of the fact that the decline in sales began before Robey's alleged interference, furnished no substantial basis for a

deduction that such interference caused any determinable loss of sales of such records; (b) that anticipated profits which Sun might have made from records never identified, prepared or offered for sale, were too speculative and conjectural to be allowed under Texas law; and (c) that in any event, the proof of claimed profits on the sales of the first two records was vague and mere guesswork, and justified no award of damages for loss of any anticipated profits. In the alternative, he contended that the award of damages in a lump sum, without specifically stating the method by which the Court calculated such damages, was error, requiring a remand to the trial court.

In its appended lengthy written opinion, the Court of Appeals determined that "there is not any fixed yardstick by which the award of damages is to be measured * * *. It was Sun's theory that the sales of the second record declined because of the knowledge in the trade that Parker had made a contract with Robey. This was a question for the trial court's determination. * * *

"* * * Though damages cannot be ascertained by a fixed rule and must be based upon estimates and opinion, it does not follow that no damages should be allowed or that the award should be merely nominal * * *. We are asked to require the District Judge to specify the method by which the calculation of damages was made. The District Judge was not required to undertake such a task."

Reasons for Granting the Writ

1. The holding of the Court of Appeals that Rule 52(a) does not require the trial judge "to specify the method by which the calculation of damages was made" is in direct conflict with the holding of this court in *Kelley v. Everglades Drainage District*, 319 U.S. 415, 420, 421,

87 L. Ed. 1485, 1488, 1489, 63 S. Ct. 1141, and in *Dalehite v. United States*, 346 U.S. 15, 24, 25, 97 L. Ed. 1427, 1434 and 1435, 73 S. Ct. 956.

In *Kelley v. Everglades Drainage District*, supra, this Court, interpreting Rule 52(a) (in connection with Sec. 83(e) of the Bankruptcy Act) states:

> "* * * We hold only that *there must be findings*, stated either in the Court's opinion or separately, *which are sufficient to indicate the factual basis for the ultimate conclusion*". (Emphasis supplied)

As pointed out in that opinion, it is not the function of this Court "to search the record and analyze the evidence in order to supply findings which the trial court failed to make".

In *Dalehite v. United States*, supra, this Court said:

> We are therefore not required to weigh each finding anew as "clearly erroneous". They were characterized below as "profuse, prolific, and sweeping". We agree. Fed. Rules Civ. Proc., Rule 52(a), in terms, contemplates a system of findings which are "of fact" and which are "concise". *The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward* [illegible]*iteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied.* Kelley v. Everglades Drainage Dist. 319 U.S. 415, 87 L. Ed. 1485, 63 S. Ct. 1141, and cases cited. Otherwise, their findings are useless for appellate purposes. In this particular case, no proper review could be exercised by taking the "fact" findings of "negligence" at face value. And, to the extent that they are

of law, of course they are not binding on appeal. E. g., Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp. 340 US 147, 153, 154, and concurring opinion at 155, 156, 95 L ed 162, 167, 168, 169, 71 S Ct. 153.

2. If the holding of the Court of Appeals that findings of specific pecuniary loss are not required as preliminary to the award of damages, is not in fact regarded as in conflict with the above cited decisions of this Court, then it is believed that the holding is sufficiently important to the general conduct of litigation and so clearly wrong as to require correction by this Court.

It cannot be said that the trial court found "specially" the facts of monetary loss. Its finding of a loss of sales, itself indefinite and completely general, does not pass upon the issue, made by the evidence, as to whether profits would have resulted from sales. The finding as made furnishes no clue as to the extent the court found losses from sales of records ready for manufacture or from sales of records not yet recorded. Obviously, this mere finding of damages, without indicating the character or the extent of any pecuniary loss suffered by plaintiff makes virtually hopeless the task of the briefer and the court on appeal.

The trial court finding discloses that in some fashion the trial court took into account (a) the inability to make further records, and (b) the curtailment of sales of those previously released. The extent to which this finding was intended to include a loss of profits, a loss of good will, or a loss of investment are impossible to determine from the Court's findings. If investigation of the entire evidence is required in an effort to determine the probable intent of the trial court in the finding of damages, then

the entire purpose of the rule for specific findings is defeated.

The Court of Appeals apparently felt that to require the District Judge to indicate a specification of the calculation by which he arrived at the amount of damages would impose upon him an onerous and distasteful task. It is here contended that in this case, the trial judge will have difficulty locating in the evidence the factual basis to support his award of damages. The writer most sincerely feels that he cannot. And in earnestness also, if trial judges are to be allowed to select amounts of damages at random, and Courts of Appeals refuse to "retry the issue of damages", as here, then, for Robey, his purse is open to the whimsy of the courts, and constitutional guaranties of "due process" become farcial. Surely, in depriving Robey of his $17,500.00 the trial judge made some calculation! What judicial discourtesy is involved in requiring his disclosure of it?

As will be pointed out in a discussion of the second question, the Texas rule requires that damages in situations here present be determinable by some method arriving at a figure "reasonably certain". In all cases passing on this subject it is settled that damages for lost profits may be determined by some rational approximation. To say that the Judge is not required to set out in his findings the method by which his approximation is reached is at once to say that he is not required to make one, and to deprive the litigant of his right to review of the principles of law taken into account by the Judge in arriving at the amount of damages. It is believed that the holding of the Court of Appeals is in direct contravention of the plain meaning of Rule 52a and in complete disregard of your honors' holdings in the cases above cited.

In this case, Don D. Robey has expended, conservatively speaking, at least $2500.00 in costs and interest in an effort to have his rights in the matter of damages passed upon by the Court of Appeals. He stands to lose $17,500.00 to a judgment which he believes founded upon a measure and proof of damages which violate the laws of Texas.

Even if the injustice done him by the Trial Court's generalized findings is not sufficient to justify the intervention of this Court, it is most urgently submitted that to prevent the destruction of the virtues of simple procedures contemplated by Rule 52A, this Court should take jurisdiction of this petition and revise the holding of the Court of Appeals that specific findings are not required.

3. Under applicable Texas law, damages for lost profits are recoverable only when the probabilities of profit and the loss of them through an actionable wrong of the Defendant are established with reasonable certainty. The Court of Appeals in the case at bar has held that there is no fixed yardstick with which to measure such damages, that the trial court was not obliged to make or determine any calculation of the approximate amount of losses and to all intents and purposes has completely disregarded the Texas law on the subject. If these holdings are permitted to stand, all of the evils resulting from *Swift v. Tyson*[2] have returned to the Federal system.

In 1938, in the case of *Southwest Battery Corporation v. Owen*, 115 S.W. 2d 1097, 1099, the Supreme Court of Texas, its court of last resort in civil cases, said:

> "The rule denying a recovery where the facts show that such profits claimed are too uncertain or specu-

[2] 16 Pet. 1, 10 L. Ed. 865.

> lative, or where the enterprise is new or unestablished, is still enforced, on the ground that the profits which might have been made from such business are not susceptible of being established by proof to that degree of certainty which the law demands. 13 Tex. Jur. p. 207, §108; p. 216, §115; 17 C. J. pp. 790, 791, and cases cited in notes."

In *Allbritton v. Madings*, 138 S.W. 2d 901, the Texas Court of Appeals, in denying a recovery for a claimed interference with a contractual right, says:

> "In suits in which recovery is sought for loss of profits in an enterprise not established at the time of the breach of contract, it is held that the profits which might have been verified from plaintiff's business are not susceptible of being proved to the degree of certainty which the law demands, and that no recovery may be had, for the reason that there is no basis for estimating the profits which would have been earned, and further that it is not certain that any profits would have been made from the operation of the business (citing authorities.)"

The evidence above set out demonstrates that the business of publishing and selling Parker's future records was a highly speculative matter, bringing this case squarely within the Texas rule.

An additional compelling consideration in the case at bar is that the plaintiff actually brought no real information to Court. Its figure of a profit of fifteen cents per record, relied on to overcome Robey's proof by books that three and one-half cents is more realistic, was not claimed to be even a good guess. Its sales were "proved" by a list of sales "taken from" unidentified and unproduced business records (R. 309). The total sales relied on to prove

the extent of sales and to "calculate" profits, apparently included records given away in promotion (R. 305). It thus appears that, as approved by the Court of Appeals, whatever figures this trial judge employed must have pyramided estimates on estimates, opinions on opinion, inferences on surmise.

As stated by the Texas Court of Civil Appeals in *Central Freight Line v. York*, 135 S.W. 2d 186, 188:

> "While the law authorizes one to recover profits as a natural consequence of a breach of a contract, it requires that such damages for loss of profits be proved with reasonable certainty; and that no recovery can be had for loss of profits which are uncertain, contingent, conjectural, or speculative. The cases also hold that no recovery can be had for loss of profits where it is uncertain whether any profits at all would have been made. Of course, the authorities recognize that to some extent profits must necessarily be uncertain and problematical, and a complainant cannot be deprived of remedy merely because of the uncertainty of the amount of profits; *but the law does require absolute certainty of data upon which loss of profits are to be estimated, and such data must be based upon substantial evidence and not wholly upon speculation and conjecture.*"

The Court of Appeals regarded the estimates of sales of the first two records as sufficient to indicate that more records would have been sold in the future but for Robey's interference. The burden of proof on this issue was on the plaintiff. The proof showed that declines in the sales of both records had begun prior to the impact of Robey's alleged interference on the records trade. Proof of the decline of sales is obviously as consistent with the inference that Parker's popularity among buyers was not consistent

as it was with the inference that the records would have sold more copies but for Robey's interference. As a matter of simple logic, if factual data is as consistent with an unfavorable inference as with a favorable one, it cannot be regarded as satisfying the requirements of the burden of proof. This compels the conclusion that the Trial Court was required to speculate as to whether future sales would have been made and whether the sales would have been sufficient to bring profits to Sun. This is the reason for the Texas rule that the data must be certain before it can serve as a basis for assessment of lost profits. It clearly demonstrates that the Court of Appeals in this case has permitted the Trial Court to speculate as to whether profits would have been made and, in addition, to determine the extent of lost profits based solely on conjecture.

Sun, in its brief on file in the Court of Appeals, states, "We believe that the Trial Court could well have entered a judgment for treble the amount of damages awarded against the Appellant based upon the evidence which was adduced in this trial." Such was and is the state of the record in this case, that if any damages above nominal damages are sustained by the evidence, their upper limits is fixed only by the imagination of the Court, because the second dollar of such damages is pure speculation. The "reasonable certainty" required by the Texas law on the subject is most obviously missing.

The rule of damages for lost profits has been the subject of many judicial problems and much litigation. The holding of the lower courts in this case will open the Federal Courts to an avalanche of contentious plaintiffs who, like Sun, will prefer the claim of tortious interference to the business hazards of contractual performance.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HARRY DOW
Counsel for Petitioner

Of Counsel:
JOEL W. COOK
WILLIAM H. SCOTT, JR.

June 4, 1957

Certificate of Service

The undersigned Morris Pepper, counsel for respondent in the foregoing petition for writ of certiorari, hereby acknowledges receipt and accepts service of a copy of such petition and its appendix, this _____ day of _____, 1957.

MORRIS PEPPER
Sterling Building
Houston, Texas

Signed and acknowledged before me, this the _____ day of _____, 1957.

Notary Public in and for
Harris County, Texas

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,197

DON D. ROBEY, *Appellant*,

VERSUS

SUN RECORD COMPANY, INC., *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(March 21, 1957)

Before CAMERON, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Herman Parker, known as "Little Junior", was a blues and rhythm singer with a limited reputation in and around Memphis, Tennessee. On June 18, 1953, he and four others known as "The Blue Flames," a group of instrumental musicians, made a contract with Sun Record Company, Inc., a Tennessee

corporation having its principal place of business in that State. The Blue Flames are not involved in the matters before us. By the contract Parker agreed to record eight phonograph record sides and more if Sun should require. The agreement gave Sun the exclusive services of Parker in the record making field and contained an express covenant that, during the life of the agreement, he would not record for anyone else. The contract was for the period of a year, and Sun had the option to extend the term for an additional year. The renewal option was exercised. Four records (eight record sides) were made. The first of these, with "Feelin' Good" on one side and "Fussin' and Fightin' Blues" on the other, was released on July 18, 1953, and soon became listed as one of the top blues and rhythm records in popularity and sales.

On September 4, 1953, the appellant, Robey, a resident of Texas, entered into a contract with Parker. It had, in substance, the same terms as Parker's prior contract with Sun except that the amount which Parker was to receive for his services was somewhat more and the term was for a longer period. In November of 1953 Sun released the second of the Parker records and its initial sales were good. Sun did not then know but soon thereafter learned of the contract between Parker and Robey. On December 3, 1953, Sun advised Robey that Parker was under contract to it. Robey was then making or preparing to make the first of his Parker records. He declined to recognize the contract of Parker with Sun thereafter made and released several Parker records. Sun brought suit in the United States District Court against Robey for wrongful interference with the contractual relationship between Parker and Sun and for wrongfully inducing the breach by Parker of his contract with Sun.

The case was tried without a jury, findings of fact and conclusions of law were made, and judgment was entered in favor of Sun and against Robey, for $17,500.00 actual damages. Exemplary damages were denied. A motion was made to set aside the judgment, for a new trial, and to amend the findings of fact. After denial of the motion this appeal was brought.

The contentions of the appellant, Robey, are (a) that the findings of the trial court, essential to its judgment, are unsupported by, or at least contrary to, the great weight to the evidence, (b) that the court erroneously awarded damages for anticipated profits which were speculative and conjectural both as to existence and amount, (c) that the trial court's failure to find the formulae by which the $17,500.00 award was settled upon is a procedural error in violation of the requirement of specific fact findings, (d) that the introduction of trade journals to prove the facts stated therein was error, (e) that the undisputed evidence shows that appellee failed to mitigate its damages, and (f) that the contract between Sun Record Co., Inc. and Parker was not valid and no liability existed for inducing a breach thereof.

This is a typical case calling for the application of the rule that recovery may be had for the wrongful procurement of a breach of contract by one not a party to it. The doctrine has roots in the medieval Ordinance of Labourers, 1349, 23 Edw. III Ch. 1. The leading English case and the one from which our present jurisprudence stems is *Lumley v. Gye*, 1853, 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707. In Texas the rule was introduced in 1903 by *Raymond v. Yarrington*, 96 Tex. 443, 72 S.W. 580, 73 S.W. 800, 62 L. R. A. 962, 97 Am. St.

Rep. 914, where *Lumley v. Gye* and a number of other cases are reviewed. The rule was announced that a person who induces a party to a contract to break it, intending thereby to injure another person or get a benefit for himself, commits an actionable wrong. From *Temperton v. Russell*, 1893, 1 Q. B. Div. 715, the Supreme Court of Texas quoted with approval the following, "I presume that the principle is this, viz, that the contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation". The courts of Texas have applied the rule in many circumstances. 25 Tex. Jur., 31 et seq., Interference § 2.

The trial court found:

> "Under date of June 18, 1953, the plaintiff Sun Record Company, Inc., of Memphis, Tennessee, entered into a contract with Herman Parker (together with certain other individuals, of no materiality here) which is in evidence and to which reference is made. Among other things, the contract provided for the exclusive services of Parker for the purpose of making phonograph records, and contained an express negative covenant to the effect that Parker would not perform (for the purpose of making phonograph records) for any other person, firm or corporation during the period of such contract. The contractual period was for one year, renewable for a second year at plaintiff's option. The necessary notice to exercise such option was given by the plaintiff April 30, 1954."

"At the time of such contract, Parker enjoyed a very limited reputation in and around Memphis. He was unknown as a recording artist or in the recording field. Due in large part to the recognition of certain talent in Parker, and training which Parker received from and under plaintiff, and as a result of the advertising which plaintiff provided, the first record which Parker made for plaintiff under its contract above mentioned met immediately with a high degree of success and, for a while at least, was among the top few records in the 'Blues and Rhythm' field in popularity and number of sales throughout the country. This record was released July 18, 1953.

"On September 4, 1953, the defendant Robey, signing as 'Duke Records by Don D. Robey, President,' entered into a contract with Parker providing for the making of phonograph records. The contract is in evidence and is referred to. In most particulars, it is similar to the earlier contract which Parker had with plaintiff. It provides a slightly higher remuneration for the musician and was to extend for a period of three years. The execution of this contract was not announced to the trade until a number of weeks thereafter.

"I find that at the time of making the contract with Parker, the defendant Robey knew of Parker's prior contract with plaintiff, and from well recognized practices and customs in the industry, he knew that in all reasonable probability such contract contained an express provision for the exclusive use of Parker's Services by plaintiff

and a negative covenant that Parker would not make records for anyone else. Despite this knowledge, *before* the contract was signed with Parker, the defendant Robey made no effort, through plaintiff or any other source to ascertain the true facts in this regard. In fact, he was anxious to conceal from plaintiff his dealings with Parker. *After* the contract was entered into, and before incurring expense thereunder, Robey made no inquiry other than to 'clear' his contract with Parker with the musicians' union. This 'clearance' meant (a) that Parker was in good standing with the union, (b) that Robey's business was affiliated with the union, and (c) that no prior contract for Parker's services was on file *with the union*.

"Without knowledge of defendant's contract with Parker, plaintiff released a second Parker record in November, 1953. This record met with considerable popularity, although not to the extent of the first.

"Defendant admittedly had actual knowledge of plaintiff's contract with Parker, on December 2 or December 3, 1953, by means of long distance telephone conversation with the president of the plaintiff corporation and with its attorney. At the time of receiving such phone call, the defendant Robey was in the process or had made definite arrangements looking toward the recording of his first record by Parker. As he incurred an expense of several hundred dollars in connection therewith, and because of his contention that plaintiff's contract was invalid and unenforceable because

plaintiff was not affiliated with the musicians' union, defendant declined to recognize any exclusive right of plaintiff to Parker's services, and proceeded to make and release Parker's records during the next several months.

"Defendant's contracting with Parker when he either had actual knowledge or was chargeable with knowledge of plaintiff's contract and the terms thereof, and his recording and releasing of Parker's records under his own contract, was done deliberately and willfully, with knowledge of plaintiff's rights, and was done purely for commercial and competitive purposes.

"By reason of the announcement through trade publications and otherwise of the fact that the defendant had Parker under exclusive contract, the sales by plaintiff of Parker's records previously released were adversely affected. Plaintiff considered it inadvisable thereafter to release other records that Parker had made for plaintiff prior to his contract with the defendant. Parker never offered to make further records for plaintiff after his contract with the defendant. By reason of its inability further to make the number of records with Parker, as permitted under its contract with him, and the curtailment of sales of those previously released, plaintiff has suffered actual damage in the amount of $17,500.00."

We need not indulge in an extended review of the testimony on which the findings were based, testimony which in several material respects was in sharp conflict. Our

duty is fixed by the rule which provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). Although Robey contends otherwise, the findings that Robey employed Parker with knowledge of and in wilful disregard of Parker's contract with Sun are supported by substantial evidence, they are not against the weight of the evidence or induced by an erroneous view of the law. We are not persuaded that a mistake has been committed or that the findings do not reflect the truth and right of the case. 2 Barron and Holtzoff, Federal Practice and Procedure 833, §1133; *Western Cotton Oil Co. v. Hodges*, 5th Cir. 1955, 218 F. 2d 158. Robey urges that it is not shown that he induced Parker to breach his contract with Sun, and that proof of his knowledge is not enough. The beliefs of Robey that Parker would breach or had breached his contract with Sun or his belief that such contract was without validity because not approved by a union, if such beliefs were entertained, would not absolve Robey from his tortious act. Robey's intentional making of a contract with Parker and proceeding to carry out such contract, knowing that the performance by Parker of the contract with him would be contrary to and in violation of Parker's contractual duty to Sun, is enough to show the inducement of the breach. *Meyer v. Washington Times Co.*, D.C. Cir. 1935, 76 F. 2d 988, cert. den. 295 U.S. 734, 55 S. Ct. 646, 79 L. Ed. 1682. Cf. *Thomason v. Sparkman*, Tex. Civ. App. 55 S.W. 2d 871; *Westinghouse Electric & Mfg. Co. v. Diamond State Fibre Co.*, D.C. Del. 1920, 268 F. 121.

A specific objection is made to the receipt in evidence of trade journals. These were offered and received for the purpose of showing that the record of Little Junior had a degree of public reception. For this limited purpose the admission of the journals was proper. *St. Louis I.M. & S. Ry. Co. v. Gunter*, Tex. Civ. App. 86 S.W. 938; *Leas v. Continental Fruit Express*, Tex. Civ. App., 99 S.W. 859, 110 S.W. 129; *Western Union Tel. Co. v. Gilliland*, Tex. Civ. App., 130 S.W. 212; *Western Union Tel. Co. v. Eckhardt*, Tex. Civ. App., 2 S.W. 2d 505. In any event there was other evidence to the same facts so that if it were error to admit these journals it would be harmless and it is to be presumed that the court disregarded all incompetent evidence. *Thompson v. Baltimore & Ohio Railroad Co.*, 8th Cir. 1946, 155 F. 2d 767.

It is contended by Robey that the award of damages is conjectural, uncertain and speculative. In determining the amount of damages for the interference with a contract for the personal services of a musical artist, and we will not deny those who had and those who sought the right to his services the privilege of regarding him as such, there is not any fixed yardstick by which the award of damages is to be measured. There was a heavy sale of the first record made by Parker for Sun. The sales of the second record started well but declined rapidly. This urge by Robey as showing that Parker's career was coming to a close and the interference by Robey, if any there was, did not result in damages. But, as Sun contends, it may be that the heavy sale of the first record might have been attributable to the skillful guidance of Sun as much as to the talents of Parker. It was Sun's theory that the sales of the second record declined because of the knowledge in the trade that Parker

had made a contract with Robey. This was a question for the trial court's determination.

Robey insists that Sun could have and should have minimized its damages by releasing the other records which Parker had cut for it. Sun, however, was of the belief that it could not sell Parker's records in profitable quantities after he had been induced to deflect to Robey. These are matters which were urged before the trial judge. They were matters for his determination. On review we are not to retry the case or to fix the amount of damages according to our notions as to the value of the injury which has been inflicted and sustained. *Sanders v. Leech*, 5th Cir. 1946, 158 F. 2d 486. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery". *Straus v. Victor Talking Mach. Co.*, 2d Cir. 1924, 297 F. 791, 802; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544; *Bigelow v. R.K.O. Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652, reh. den. 327 U.S. 817, 66 S. Ct. 815, 90 L. Ed. 1040. Though damages cannot be ascertained by a fixed rule and must be based upon estimates and opinion, it does not follow that no damages should be allowed or that the award should be merely nominal. *Story Parchment Co. v. Paterson Co., supra.* We are asked to require the district judge to specify the method by which the calculation of damages was made. The district judge was not required to undertake such a task. Our duty is to determine whether the finding as to the amount of damage was clearly erroneous. *Sanders v. Leech, supra.* We are of the opinion that the finding was proper.

It is asserted by Robey that the contract between Sun and Parker was void for want of consideration, had been induced by fraud and had been repudiated by Parker. There was a valid consideration for the making of the contract and further consideration passed when Parker made recordings and received royalties. Parker was not relieved from his obligation to Sun merely because Sun had the option, rather than being obligated, to use Parker in making other recordings during the contract period. "A contract may be so made as to be optional on one of the parties and obligatory on the other, or obligatory at the election of one of them; and mutuality of obligation is not essential where there is any consideration for a contract other than mutual promises, as in the case of options and other unilateral contracts, which are supported by a consideration." 10 Tex. Jur. 157, Contracts, §92; *Guaranty Mortgage Co. v. Nowell*, Tex. Civ. App., 72 S.W. 2d 354; *Guaranty Building & Loan Co. v. Nowell*, Tex. Civ. App. 76 S.W. 2d 830.

Parker testified that he asked Phillips, President of Sun, if he was a member of the union and received an affirmative reply. In the cross-examination of Phillips were the following questions and answers:

> "Q. Had you asked any of them [Parker and the Blue Flames] if they belonged to the American Federation of Musicians?
>
> "A. No, I didn't.
>
> "Q. You didn't tell them that you did belong to it?
>
> "A. No, I didn't, I don't remember specifically whether I did or not, but I would say offhand that I did not.
>
> "Q. That you didn't?
>
> "A. That's right."

We do not think this by any means establishes any misrepresentations to Parker by Phillips or that anything said or unsaid about the union influenced Parker to enter into the contract with Sun. But whether so or not, Robey, as an intermeddler, cannot avail himself of any such defense even though Parker might have asserted it in an action against him for breach of contract. Citing many authorities to support its statement, the Texas Court of Civil Appeals has said:

> "In our opinion the correct rule is that if a person with knowledge and fraudulent intent induces a party to breach his contract with another, such person is liable in damages though the breached contract may be unenforceable as between the contracting parties because of the statute of frauds". *Yarber v. Iglehart*, Tex. Civ. App., 264 S.W. 2d 474, 476.

Such rule is also applicable here.

As to the contention that Parker had repudiated the Sun contract before Robey dealt with him, it is enough to say that, upon more than ample evidence the district court found otherwise and correctly so.

Other points urged by Robey are without merit and need not be discussed. We find no error and the judgment below is

AFFIRMED.

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SUPREME COURT, U.S.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1067~~ 170

DON D. ROBEY, *Petitioner*

v.

SUN RECORD COMPANY, INC., *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OPPOSING ISSUANCE OF WRIT

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June, 1957

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OPPOSING ISSUANCE OF WRIT

Statement of the Case

The facts set forth by Petitioner under his heading "Statement of the Case" are incomplete and give an inaccurate picture. Petitioner has picked and chosen at random certain portions of the evidence or language from the Record, which Petitioner considers favorable to his side, most of it being evidentiary facts, and not ultimate facts. The evidence adduced at the trial by Respondent is not

adequately set forth, and Petitioner's Statement of the Case cannot, in Respondent's opinion, be labeled as being a fair or full summation of the Statement of the Case.

Actually, the conclusions reached by the trial court were based upon factual issues, which were decided adversely to Petitioner, and which the Court of Appeals, in stating in its opinion that it "need not indulge in an extended review of the testimony on which the findings were based, testimony which in several material respects was in sharp conflict", were, if not expressly approved by the Court of Appeals found as not being clearly erroneous. The Court of Appeals also held in its opinion that the findings as to damages was proper (see Petitioner's Brief, pp. 21, 24).

Both Petitioner and Respondent are engaged in the business of producing records, and the evidence disclosed that the very basis and existence of the recording industry depends upon the recording company having an exclusive contract with the artist, whereby the artist was to perform only for the recording company, and containing a negative covenant that the artist will not record for any other company (R. 212). Both Petitioner and Respondent sold their products through distributors, and these distributors handled products of several recording companies. The evidence further revealed that without having such an exclusive product to offer to the distributors, that a recording company had nothing to offer or to sell its customers (R. 368); that not only was this the very basis on which the recording company offered its wares, but that this was so because the talent was unique (R. 212); that if a recording company could not so assure its distributors that it had an exclusive product, such recording company could

not survive in the industry (R. 368). That no distributors would offer for sale any of the records of a recording company unless the artist was under such an exclusive contract with a negative covenant that the artist would not perform for anyone else, but if the same artist were to appear on another label (meaning record) of a different company, the distributor would not "push" the sales of that particular record, and the recording company would not be able to sell that artist's particular records (R. 207-209).

The trial court found that Parker, an unknown artist, was trained by Respondent and as a result of the training, and the advertising which the Respondent provided, the first record Parker made under his contract with Respondent, released in July, 1953, met immediately with a high degree of success, and was among the top few records in popularity and number of sales throughout the country (R. 142-143). The trial court further found as an ultimate fact, undisputed by Petitioner in his Petition before this Court, that Petitioner, signing as Duke Records, with knowledge that Parker was under an exclusive contract to Petitioner, with a negative covenant not to perform for anyone else, entered into a contract with Parker, providing for the making of phonograph records for Petitioner (Petitioner's Brief, p. 19). The Petitioner thereby enticed Parker, a new star, from Respondent, by offering Parker a more lucrative contract than Parker had with Respondent. Petitioner does not dispute the trial court's findings that such action by Petitioner was willful and deliberate, with knowledge of Respondent's contract, and was done purely for commercial and competitive purposes (R. 145). Respondent, in November, released another record of Parker, which the trial court found met with

considerable popularity, although not to the extent of the first (R. 144). Although Petitioner entered into his contract with Parker on September 4, 1953, news of such contract was concealed and not made known to the trade until December 19, 1953 when an announcement was made through trade publications and otherwise, of the fact that Petitioner now had Parker under an exclusive contract (R. 218). Up until December 19, 1953, very little damage had been sustained by Respondent, because the distributors, who sell the records to the public, were not aware of Petitioner's contract with Parker, and the distributors believed that Respondent still had Parker as its star under an exclusive contract. Meanwhile, the sales of Parker's record were exceptionally good, especially for a first recording by an artist. The testimony adduced by Respondent showed that Respondent first learned of Petitioner's contract with Parker on December 2 or December 3, 1953, when Petitioner was about to have Parker record for Petitioner, and made every effort to have Petitioner refrain from interfering with Respondent's contract with Parker. The trial court found in its findings of fact, that Petitioner was contending that the contract Respondent had with Parker was invalid and unenforcable because Respondent was not affiliated with the Musician's Union, and Petitioner declined to recognize Respondent's right under its contract for Parker's exclusive services (R. 145). Respondent's attorney made a long distance trip from Memphis, Tennessee to Houston to reason with Petitioner, but was unable to see Petitioner, and Petitioner proceeded to make recordings of Parker. At the time when such news was made known to the trade, Respondent had made four Parker records, but only two had been released on the market (R. 261). The evidence disclosed that such notice or an-

nouncement to the trade was, for all practical purposes, tantamount to destroying, not only the sale of Parker's records already released by Respondent (R. 219), but to render it unwise and unprofitable to release the other two Parker records which Respondent had already had recorded (R. 222, 224). Respondent showed by direct testimony, as well as by a chart (R. 369), how Parker's sales, following such notice to the trade and to its distributors, declined to the point where there were very few sales of its Parker records, and that when Petitioner thereafter, in early 1954, placed first recording made with Parker on the market, it caused Respondent's records of Parker to practically cease selling (R. 219-227). Respondent's testimony further showed that thereafter Respondent was put in an unfavorable light with its distributors (R. 224-225), and that the distributors instead of "pushing" Respondent's line and products, began to lose confidence in Respondent's company (R. 227, 389, 336).

Respondent made proof that from the time that it made its contract with Parker on June 18, 1953, through December 31, 1953, it showed a profit for its business during that period of time (R. 376), but that thereafter Respondent was almost out of business, because it no longer had any star artist, having thus lost its one and only star artist (the other artists of Respondent did not compare in sales with Parker's records) (R. 364); that the evidence further disclosed that although for the entire year of 1954 Respondent earned more money than the year 1953, that this was due to Respondent having discovered and having developed a new star, a white boy by the name of Elvis Presley (R. 342), but that Respondent could have earned more money during that period of time if it had managed to

retain Parker under its contract (R. 342); that Respondent's records showed a sharp decline in profits during first half of 1954, after news came out that Petitioner had Parker under contract (R. 377). Petitioner, in its brief before this Court, does not set forth these facts to give this Court a more full and complete picture of what the evidence did adduce on the question of damages. Respondent showed in detail its cost of production, its expenses, and how it arrived at the profit of 15¢ per record on Parker's records (R. 251-262). The detailed items of expense are specifically set forth, and show that the cost on the first record of Parker was $17,836.75 (R. 252)). The testimony further disclosed that the amount of records sold from Parker's first recording was 74,153 at 40¢ per record, making the gross receipts $29,661.20 (R. 253). These were not "estimates", as Petitioner contends, but actual figures taken from Respondent's records, and which are reflected by Exhibit No. 10 (R. 309). Despite counsel's assertion in his petition that Respondent did not produce books or records in Court, the same is not true, because Respondent did have such records in court. Moreover, the Record shows that Respondent's witnesses were reading at times from Respondent's books and records. Counsel for Petitioner on appeal were not the same counsel that were at the trial, and we believe their statement that Respondent did not produce records is undoubtedly made in good faith, but counsel are in error, and closer examination and study of the Record in this case would so reveal. (See R. 253, 304, 305, 309, 308, 331).

The evidence further disclosed that from such gross receipts of $29,661.20, a 2% discount thereon was allowed to the distributors. Subtracting $17,836.75, which were the costs so incurred in making the number of records

on the first recording, from the gross receipts of $29,661.20, leaves a balance of $11,824.45 as the net profit. Subtracting the sum of $593.02 (the 2% discount) from $11,824.45, makes a final net profit of $11,231.23, which Petitioner made on Parker's first recording. In order to find out what the net profit per record amounted to, the evidence disclosed (R. 254), dividing $11,231.23, the net profit, by 74,153 records sold, makes a net profit per record of 15¢. These detailed facts are set forth to refute Petitioner's statement that the evidence showed an "estimate".

The evidence further adduced by Respondent disclosed that Respondent makes a net profit of a little over 15¢ per record on all records over the first 5,000 records sold (R. 397); that the break-even point in Respondent's operation of its business, was 5,000 records. Petitioner attempted, by his testimony, to show that his overhead was of such a nature that Petitioner's break-even point was 20,000 records (R. 511), but Petitioner was operating its business on a different scale and the trial court had the right, as it did, to find the facts to be in favor of Petitioner on such a disputed fact issue.

On the total sales of the second record, which sales amounted to 27,000, the net profit on this second record amounted to $4,050.00 (27,000 times 15¢) (R. 201-203). The undisputed testimony showed that Respondent netted a profit of over $15,000.00 on the first two Parker records, despite the wrongful acts of Petitioner, and despite Petitioner "killing" or destroying, any further sales of the first two records which had been released.

The evidence further revealed (R. 222-224), that it was deemed unwise to release the other two recordings of Par-

ker, since the distributors would not handle Respondent's other recordings of Parker where Parker had gone over to another company, and the reasons why such records could not be released and would be unprofitable are set forth in detail on pages 370-371 of the Record. These factual issues, which have thus been set forth as the evidentiary facts well support the ultimate fact findings of the trial court to the effect that (1) "by reason of the announcement through trade publications, and otherwise, of the fact that the defendant had Parker under exclusive contract, the sales by plaintiff of Parker's records previously released were adversely affected. Plaintiff considered it inadvisable thereafter to release other records that Parker had made for plaintiff after his contract with the defendant", and (2) "by reason of its inability further to make the number of records with Parker, as permitted under its contract with him, and the curtailment of sales of those previously released, plaintiff has suffered actual damage in the amount of $17,500.00." (R. 146).

On these individual facts so found by the trial court, the decision of the district court was manifestly correct, and the Court of Appeals approved the same. There is no conflict of decisions, as will be more fully argued and shown hereinafter. Furthermore, in the light of the findings that Petitioner committed the tort of inducing a breach of contract, and was guilty of interfering with Respondent's contractual relations with Parker, the trial court could not have reached any other result than that which it did reach. The cases on this subject which so hold, are numerous (84 A.L.R. 43, Supplemented by 26 A.L.R. 2d 1227), where a whole host of cases are set forth dealing with the subject.

Respondent's Answer to Second Question Presented

Respondent desires to answer the second question presented in Petitioner's brief out of order, in the belief that it will make the later discussion of Respondent's answer to the first question more elucidating.

There is no conflict in the decision of the Court of Appeals in this case with any Texas law or Texas cases, as Petitioner would have this Court believe. In 1903 the Supreme Court of Texas, which is the highest court of the state, had occasion to pass upon the precise point of law involved in this case. That case is *Raymond v. Yarrington*, 73 S.W. 800, and is a case on all fours. In *Raymond v. Yarrington*, plaintiff sued for unjustifiable interference by the defendant with another contract by the plaintiff and a third person, and also for inducing a breach of such contract. The Supreme Court of Texas held that such course of conduct on the part of the defendant was actionable, and that the defendant could be sued for loss of profits due to the defendant's tortious conduct. With reference to the quantum of proof plaintiff must present to recover damages, the Supreme Court of Texas had the following to say (quoting from Page 804 of the opinion):

> "We are also of the opinion that the court erred in instructing a verdict for the defendant Harwood. The charge is as follows: 'In this case there is no evidence tending to show what part of the decrease in the business of Raymond & Bro. below that done by Harwood & Yarrington was caused by the competition of Harwood, if any, in violation of his contract, what part was due to lack of experience in the business on the part of Raymond & Bro. as compared with Harwood & Yarrington. . . . The jury will therefore return a verdict for the defendant.' In view of the fact

> that the case will be remanded for a new trial, we must refrain from discussing the testimony. We may say, however, that the evidence does not show how much, if any, the plaintiff was damaged, and it may be that if, under the testimony and a proper instruction, the jury had given only nominal damages, the court should not have disturbed the verdict. From the nature of the case it is impossible to show the damages with accuracy, and to require accuracy in such a case would be to deny a remedy for a wrong. In Welsh v. Morris, previously cited, a judgment for substantial damages was sustained upon testimony quite as unsatisfactory, to say the least of it, as that introduced in the present case."

It will be noted that the defendant in the *Raymond v. Yarrington* case made the same contention as is being made by the Petitioner in this case, asserting that there was no evidence tending to show what part of the decrease in the business of the plaintiff was due to the tortious conduct of the defendant. The Supreme Court of Texas, as reflected from the portion of the opinion just quoted, in no uncertain terms laid down the rule in Texas that where from the nature of the case it is impossible to show the damages with accuracy, that to require such proof would be to deny a remedy for a wrong. This decision by the highest court of Texas has never been overruled, nor questioned in any Texas decision, and is still the law in Texas. This Honorable Court has also had before it more than one case in which the precise argument being made by Petitioner herein was urged, in which the contention was made that the damages awarded were too conjectural, uncertain and speculative and should not be allowed. These cases are the following:

Eastman Kodak Company v. Southern Photo Materials Company (1927), 273 U.S. 368; 379; 71 Lawyer's Edition 684;

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562, 563; 51 S. Ct. 248, 250; 75 Lawyer's Edition 344;

Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251; 66 S. Ct. 574, 580; 90 Lawyer's Edition 652;

Hetzel v. Baltimore & Ohio, 169 U.S. 26, 39; 42 Lawyer's Edition 648, 652; 18 S. Ct. 255.

Although not citing the Texas case of *Raymond v. Yarrington* as an authority, this Court also laid down the rule that a wrong-doer is not entitled to complain that the damages cannot be measured with exactness and precision. In the case of *Story Parchment Company v. Patterson Parchment Paper Co.*, this court expressed itself as follows (51 S. Ct. 250):

> "Where the fact itself is of such a nature as to preclude the ascertainment of the amount of damage with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The Court of Appeals in the instant case, followed the doctrine laid down in Texas by the *Raymond v. Yarring-*

ton decision and cited the above mentioned opinions of the Supreme Court of the United States, and also the rule laid down by these courts that the constant tendency of the courts is to find some way in which damage can be awarded where a wrong has been done, and that difficulty of ascertainment is no longer confused with right of recovery. The Supreme Court of the United States, in the *Story Parchment Co. v. Patterson Parchment Paper Co.*, supra, expressly approved two decisions from the State of Michigan in which the same doctrine was laid down. These cases are *Allison v. Chandler*, 11 Mich. 542, 550, and *Gilbert v. Kennedy*, 220 Mich. 117, 119:

The evidence presented by Respondent in the case at bar, in our opinion, certainly falls within the rules thus laid down by the Supreme Court of Texas in *Raymond v. Yarrington*, and the U. S. Supreme Court cases above cited, and all of the Respondent's evidence tended to show that Respondents sustained such damage, and the trial court could, as it did, conclude from this evidence as a matter of just and reasonable interference from proof of petitioner's wrong, that the wrongful acts tended to, and did, injure Respondent's business and caused Respondent damage. In the *Bigelow v. R.K.O. Radio Pictures*, supra, the United States Supreme Court laid down a guide to help the plaintiff recover where the defendant had, by his wrong, made it impossible to prove damages with definiteness or certainty. The court in the *Bigelow* case stated:

> "That in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of plaintiff's wrongful acts and their tendency to injure plaintiff's business, and from the decline in prices, profits and values, not shown to be attributable to other causes that the de-

fendant's wrongful acts had caused damage to the plaintiff."

It will be noted that in all these cases, including the situation that existed in the *Raymond v. Yarrington* case, that the Defendant contended that the plaintiff could not show with reasonable certainty that the damage plaintiff complained of was attributable to the defendant's wrongful act. The Supreme Court of Texas required very slight evidence and reversed the trial court which had rendered an instructed verdict for the defendant under the argument, that plaintiff could not prove what part of the decrease in the business of plaintiff was caused by competition of the defendant, or what part of loss of profits were due to lack of experience in the business on the part of the plaintiff.

In all of the above cited cases, the courts held that the jury could, in the absence of more precise proof conclude as a matter of just and reasonable inference from the evidence that the decline in prices and profits and values were caused by the wrongful acts of the defendant.

We have set forth under our statement of the case many of the facts adduced from the evidence in this case showing that Respondent expended time and money in developing Parker into a recording star, and that Parker's first record proved to be a hit (R. 200), and sold over 74,000 records, and that Appellee netted a profit of over 15¢ per record; that of all of the recording artists that Respondent had, Parker was its sole star. The profits of $11,100 were on the first record and the second record was doing very well when Petitioner made it known to the industry that he had Parker under a contract with

him. Respondent's evidence further disclosed that without having an exclusive product to offer to the 32 distributors who were distributing Respondent's records, that Respondent would not have a chance of surviving in the industry (R. 368); that when an artist had a hit on one record, it is reasonable to assume that his records will sell more greatly now that he has proved his talent and commercial worth (R. 214), and more so than if he had not had a record. Respondent developed its case on damages also by showing that sometimes contracts on artists are sold and transferred at a profit (R. 210). The act of the Petitioner in placing Parker under an exclusive contract with him, and letting it be known to the recording trade that Parker was so under contract to him, deprived Respondent of the opportunity to sell Parker's contract and making a profit. It was further shown that when Parker's second record was released in November, 1953, its initial sales were better than sales on Parker's first record (R. 202-263), that this indicated it, too, was going to be a "hit" and would exceed the sales of Parker's first record (R. 263); that with the announcement to the trade journals on December 19, 1953 by Petitioner, that Little Junior Parker was under contract to him, the announcement was tantamount to destroying the sales of Parker's records already on the market (R. 219) and to make it impractical and unprofitable to release the other two Parker records which Appellee had already recorded (R. 222-224). Respondent then proved that when Petitioner put out his first record of Parker (Duke 120), that this practically stopped the sales of all of Respondent's records made by Parker; and that Respondent's distributors would not push Respondent's products, and many of them refused to even

handle them (R. 227, 389, 366). All of this evidence tended to show that Respondents sustained damage from the tortious act of Petitioner.

In the cases cited above, it was held that the depreciation in receipts (here sales and receipts) during and after the wrongful act of the tort feasor from what it was prior thereto, was a proper method of proving damages. Here, as in the cited cases, the Defendant (petitioner), had made it impossible to prove the damages with certainty and definiteness, and such damages were thus not capable of being so definitely ascertained. There were no other facts in the record showing that such decrease in sales could have come from any other source, except from Petitioner's act in interfering with Respondent's contract, and, as so strongly stated in the *Bigelow* and other cases, the Court (or jury) could conclude as a matter of just and reasonable inference, from the proof of the tort feasor's wrongful acts, and their tendency to injure plaintiffs' (Respondent's) business and from the decline in profit (receipts also here) not shown to be attributable to other causes, that it was Petitioner's wrongful acts that had caused damage to Respondent.

Furthermore, Respondent, as in the *Bigelow* case, proved damage by another method. In the *Bigelow* case, the plaintiff compared its earnings with that of a competitor, and this method was upheld by the U.S. Supreme Court as a proper class of evidence to prove damages in a tort proceedings. In the instant case, Respondent showed that in Elvis Presley, its new artist, it had an artist comparable to Parker (R. 336-337, 378-380). The trial court permitted evidence to be heard as to the number of records sold by Elvis Presley, commenting that he thought such evidence

was admissible on the grounds of damages, since Elvis Presley was a comparable artist to that of "Little Junior" Parker. Elvis Presley was also unknown when he came to Sun Record Company, and Sun Record Company developed him to where he had become famous. In fact, today, Elvis Presley is regarded as the most sensational recording artist in the business and his sales have been phenomenal. It was further shown to the trial court that Elvis Presley was an artist whose recordings appealed to the same type of customers as Parker's, so to speak, being of the same general category, namely "Rythm and Blues", and Miss Keisker who kept the records for the Appellee showed that on the Elvis Presley records, even though he was an unknown when he first started, that his first five (5) records netted a sale of 211,710 or an average of over 42,000 per record. On this average the net profit per record would be $6,300 (42,000 × 15¢). It is thus easy to see that it would have only taken three (3) records, based upon such a comparison, to reach the figure of over Seventeen Thousand Five Hundred Dollars ($17,500), which the Court awarded as damages to the Respondent.

The cases cited by Petitioner in his brief are not applicable, and are not analogous situations to the facts in the case at bar. Petitioner cites the case of *Allbritton v. Madings*, 138 S.W. 2d 901 (Tex. Civ. App.), by an intermediate appellate court of Texas, wherein recovery was sought for loss of profits in an enterprise not established at the time of the alleged breach of contract. In the case at bar, the business of the Petitioner was established, and therefore the fact situation is different from that cited by Petitioner in his brief. Likewise in the *Southwestern Battery Corp. v. Owen* case, 115 S.W. 2d 1097, also cited by

Petitioner, the portion quoted by Petitioner on Page 10 of his petition also refers to a situation where the enterprise was unestablished, and there were therefore no figures or basis upon which loss of profits might be ascertained. The legal distinction lies in such different fact situations. We reiterate that there is no real conflict in the decision by the Court of Appeals in this case with any Texas law. The Court of Appeals herein followed the law of the State of Texas as laid down in the *Raymond v. Yarrington* case, and which doctrine the Supreme Court of the United States has itself held, in the cases above cited, to be the only fair way by which a wronged person can recover from one who has made it impossible to prove damages with accuracy. The decision below is correct, and the Court of Appeals so decided upon the facts in the case, and in approving the fact findings of the district court. In the case of *Graver Manufacturing Co. v. Linde Company*, 336 U.S. 271, 275, and cases cited, this Court held that it will not act as a court for the correction of errors in fact finding, and cannot undertake to review concurrent findings of fact by two courts below "in the absence of a very obvious and exceptional showing of error".

We most respectfully submit that there is no such showing of error, and that the two lower courts properly decided this case. We believe that the Court of Appeals has reached a reasonable and permissible result, and the statement in the Court of Appeals' decision that the Court of Appeals was not persuaded that a mistake had been committed, or that the findings do not reflect the truth and the right of the case is well substantiated by the record in this case. The larcenous conduct of Petitioner, in enticing away the star artist of Respondent, if permitted to go un-

punished, and the wronged person not compensated for such wrongful act, would bring about an intolerable and chaotic condition in this particular industry. What is being said here about the recording business is undoubtedly true in contracts prevailing in other fields of entertainment, such as television, movies, and the legitimate theatre. There are always "Robeys", and there probably always will be, unless courts will grant injunctions to prevent interference with contractual relations, of inducing a breach of a contract, or will impose damages upon the wrong-doer. In fact the courts have usually allowed exemplary damages as a punitive measure. Although the trial court in the case at bar found petitioner, Robey, to have acted deliberately and willfully, the court permitted Robey to escape from imposition of exemplary damages. For this court, or any other court, to permit Robey now to escape the consequences of his intermeddling for his own profit and private gain would be to encourage others to do the same, and the result would not only cause chaos in an industry such as this, but could well be catastrophic. There would be no way to protect those engaged in the industry from keeping the exclusive services of their artists; to so allow Petitioner to escape entirely from all liability on the ground that damages cannot be proved by any other method than that which Respondent did in this case, or requiring greater certainty, would encourage and enable other Robeys to woo away artists who might be under exclusive contracts. This certainly would not be sociably desirable, and the wronged person would have no adequate remedy at law because in many instances the artists themselves are either outside the jurisdiction of the place of residence where the plaintiff lives, or is on tour, or is not able to

respond in damages, and the only effective remedy is to proceed against the third party tort feasor. *Lumley v. Gye* (1853), 2 El. & Bl. 216, 118 Eng. Rep. 747. See 17 *Cornell Law Quarterly*, 509.

The Court of Appeals is an expert tribunal of the laws of the state within its circuit, *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-8, and we believe the Court of Appeals in this case properly held that the District Court arrived at a correct and desirable result.

Respondent's Answer to First Question

The holding of the Court of Appeals in the instant case that the district judge was not required to specify the method by which the calculation of damages was made is not in conflict with the two cases cited by Petitioner in his brief, to-wit: *Kelley v. Everglades Drainage District*, 319 U.S. 415, 420, 421, 87 L. Ed. 1485, 1488, 1489, 63 S. Ct. 1141, and the case of *Dalehite v. United States*, 346 U.S. 15, 24, 25, 97 L. Ed. 1427, 1434 and 1435, 73 S. Ct. 956.

The authorities hold that the trial court under Rule 52(a), is not required to make findings on all the facts presented, but need only find such ultimate facts as are necessary to reach a decision in the case: *Klimkiewicz v. Westminster Deposit & Trust Co.*, 122 Fed. 2d 957, 74 App. D.C. 333, cert. den., 62 S. Ct. 633, 315 U.S. 805, 86 L. Ed. 1204; *Gay Games v. Smith*, 132 Fed. 2d 930 (C.C.A. Inc.) (1943); *McGee v. Nee*, 113 Fed. 2d 543 (C.C.A. Mo.) (1940); *Dedekerk v. Muncie Gear Works*, 179 Fed. 2d 821.

In *Klimkiewicz v. Westminster*, supra, in answer to Petitioner's complaint that the district court's findings of

fact were mere statement of generalities and conclusions, and did not meet the requirements of Rule 52(a), that court said "The judgment should stand if the opinion below gives the Appellate Court a clear understanding of the basis of the decision".

In *Gay Games v. Smith*, supra, the Master's findings of fact were very detailed, but the district court's findings of fact were only one-quarter the length of the Master's. The Court of Appeals for the 7th Circuit held that district courts are not required to pursue the same detail in their findings as the Master, and if the evidence supported the court's findings, that is all that is necessary.

In *McGee v. Nee*, supra, the 8th Circuit Court stated (Page 546), "A trial court, in making findings of facts, is required to find only the ultimate facts. The findings should be "a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred" (Citing cases).

In *Anglo-American Land M. & A. Company v. Lombard*, 132 F. 721 (C.C.A. 8th), in passing upon the same point as to how specific a trial court should be in finding its facts, that Court stated (p. 734) "The ultimate facts must be so stated that, without inferences, or comparisons, or balancing testimony, or weighing evidence, the case may be determined by the application of pertinent rules of law. If any ultimate fact material to the issues is to be inferred from the whole evidence, or from other facts proved or admitted, the inference must be drawn by the trial court, and the fact must be stated in the finding. Like the special verdict of a jury, a special finding can present only questions of law.

Respondent most respectfully submits that the learned trial court complied with the provisions of Rule 52(a) and did set forth the ultimate facts. Petitioner does not cite any case that holds that a trial court in determining what the amount of damages should be, must set forth the mental processes by which the trial court arrived at such amount. Neither of the two cases cited by Petitioner in his brief are cases which involved the question that the trial court, in finding what the amount of damages to the plaintiff should be, had to make other fact findings to show how the court arrived at such ultimate finding of the amount. Therefore, the cases cited by Petitioner are not in point, and are not in conflict with the opinion of the Court of Appeals rendered in the instant case. Petitioner contents himself with picking language from these two cases, which are of a general nature, and then concludes that the trial court did not follow rule 52(a), and from this false premise then argues that the cases cited by him hold that the trial court must, under Rule 52(a) specify the method by which the calculation of damages was made. Even in the *Kelley* case, cited by Petitioner, this court stated (63 S. Ct. 1143) "The nature and degree of exactness of the findings required depends on the circumstances of the particular case. In the *Western Pacific and Chicago, Milwaukee, St. Paul* and *Pacific* cases, we pointed out that in cases of railroad reorganization, the duty of making basic evidentiary findings does not require a determination in terms of dollars and cents, of the value of the assets subject to the respective liens."

Unless a sensible and reasonable interpretation and view of Rule 52(a) is taken by the courts, it can only lead to absurd results and endless confusion. Every defeated liti-

gant will complain that the trial court did not find some fact that the defeated party felt, or believed, should be included. There would be no way of satisfying every losing party, and trial courts will be harrassed with requirements that they must find every detailed evidentiary matter, and the very purpose of Rule 52 will be defeated.

Even in a jury trial, the jury is not required to relate how it arrived at the amount of damages which it finds. The trial court instructs the jury as to what the jury may, or may not, consider in arriving at the amount of the damages. Surely, the trial court, in a case where it sits without a jury, should not be required to outline its mental processes by which it arrived at the amount of damages assessed against the losing party.

In the particular type of case which is involved herein, there is more than one measure of damages that the trial court could use. In a case of this nature, the courts have very readily assessed exemplary damages against the wrong-doer. In the instant case, the trial court did not assess exemplary damages against the Petitioner, although the trial court found that the conduct of the Petitioner was deliberate and willful, and was done for purely competitive and commercial purposes. However, a reading of the cases will reflect that the courts have, in determining the amount of damages to be assessed against a wrong-doer, allowed a greater amount where the act has been done to intentionally injure another, and for one's own personal profit, as distinguished from where the act has been one of negligence, or where the act has been done not for personal profit or gain by the wrong-doer. An excellent article setting forth cases and the reasons why certain rules or measures of damages are employed by the court in this

type of tort, is set forth in 30 *Columbia Law Review* 241, where three (3) different measures of damages are set forth, depending upon whether the act of the wrongdoer in causing the damage was due to negligence, or due to an intent to injure the property of another, and, as has been shown hereinbefore, the contract rights of a party are considered by the courts to be property. As shown by this law review article, and by the cases in support thereof, the courts have not hesitated to hold the intentional tort feasor liable in a greater sum for the damages he has caused the plaintiff than in other types of cases.

In the *Bigelow v. R. K. O. Radio Pictures* case, supra, the court submitted two classes of evidence of damage to the jury, one being a comparison of earnings with a competitor of similar size. In the instant case, Respondent compared the number of records sold by a comparative artist catering to the same class of people, to-wit: Elvis Presley. The second was a comparison of the plaintiff's receipts before and during the alleged conspiracy. In the instant case the Respondent likewise submitted evidence of damage by comparing the sales of Parker's records immediately prior to December 19, 1953, when the wrongdoer, the Petitioner herein, made it known to the trade that Parker was under a contract with him, and the amount of sales made during the period thereafter. This Honorable Court in the *Bigelow* case, held that in submitting the two classes of evidence of damage to the jury that each tended to show damage to the plaintiffs and they were not mutually exclusive, and that the defendant's argument that it was impossible to establish any measure of damage, because the unlawful system which defendants had created precluded plaintiffs from showing that other conditions affecting the profits would have continued without change unfavorable to them during the period,

if that system had not been established, should be overruled (66 S. Ct. 579). If the trial court, acting with a jury, can so charge the jury on the measure of damages, and instruct the jury as to what evidentiary facts it may consider in reaching its verdict, why cannot a learned trial court, having a knowledge of the law, instruct itself mentally as to how to arrive at the ultimate fact of the amount of damages to be awarded.

It will be noted in the instant case that the trial court did set forth findings of facts upon which it reached the conclusion as to the amount of damages, and a reading of the trial court's findings of fact which are set forth in full in the Appendix of Petitioners's brief discloses that the trial court found as a fact that the Petitioner Robey committed the tort; that in signing Little Junior Parker to a contract, that Petitioner induced Parker to breach his contract with Respondent and interfered in the contractural relations between Respondent and Parker; that such action was willfully and deliberately done by Petitioner for Petitioner's benefit; that Respondent, having had the services of its star performer taken away by such wrongful act on the part of Petitioner, was unable to make any more Parker records (as Respondent's contract with Parker provided); that if Respondent could not thus make any more records of Parker, who had now become known in the record trade by virtue of his hit on his first record, that the Respondent was thereby deprived of the opportunity to earn a profit under its contract with Parker. The larcenous conduct of Petitioner, Robey, had brought Parker into Petitioner's stable of artists, and had deprived Respondent of its one and only star artist. The trial judge, the Honorable Ben Connally, an able and learned judge, expressed such acts in his findings of the

ultimate facts, and the trial court gave as his reasons for finding damages that Respondent "by reason of its inability further to make the number of records with Parker, as permitted under its contract with him, and the curtailment of sales of those previously released, plaintiff has suffered actual damage in the amount of $17,500". This finding was based on the evidence, and, as shown under the authorities hereinbefore cited, it was not necessary for the trial court to determine every evidentiary fact leading to this ultimate fact finding. It was a fact issue decided adversely to Petitioner and Respondent feels, as did the Court of Appeals, that the trial court should not be required to set forth in detail the mental processes by which it determined this ultimate fact of $17,500 as to the amount of damages. There is no conflict between any of the authorities cited by Petitioner, and the opinion of the Court of Appeals herein. There is no important state question in conflict with applicable Texas law as contended for by Petitioner. The justice and right of the case lies with Respondent. Two courts have so found; there should be a finality to this judgment.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel:
MORRIS PEPPER

June , 1957

Certificate of Service

The undersigned, Harry Dow, counsel for Petitioner in the foregoing Brief Opposing Issuance of Writ, hereby acknowledges receipt and accepts service of a copy of such brief, this _____ day of _____, 1957.

_____

HARRY DOW
First National Bank Bldg.
Houston, Texas

Signed and acknowledged before me, this the _____ day of _____, 1957.

_____

Notary Public in and for
Harris County, Texas